

SUPREME COURT U.S.
APPENDIX

Supreme Court, U.S.

FILED

JUN 25 1971

E. ROBERT SEAGER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

70-5061

No. 6401

THOMAS KIRBY (Otherwise Called Kirby Thomas),
Petitioner,

VS

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF THE STATE OF ILLINOIS, FIRST DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1970
CERTIORARI GRANTED MAY 2, 1971

Supreme Court of the United States

OCTOBER TERM, 1970

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THOMAS KIRBY (Otherwise Called Kirby Thomas),
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
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OF THE STATE OF ILLINOIS, FIRST DISTRICT

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[Caption Omitted]

APPENDIX
DOCKET ENTRIES

April 8, 1968

In the Circuit Court of Cook County. Return of Grand Jury in Case No. 68-1223 with indictment charging Thomas Kirby, otherwise called Kirby Thomas, and Ralph R. Bean with robbery:

"in that they, by the use of force and by threatening the imminent use of force, took thirty dollars in United States currency and seven travelers checks from the person and presence of Willie Shard in violation of Chapter 38 Section 18-1, of the Illinois Revised Statutes 1967, . . ."

April 16, 1968

In the Circuit Court of Cook County. Defendant Thomas Kirby arraigned. Public Defender appointed as counsel. Plea of Not Guilty entered. Case assigned to Hon. L. Sheldon Brown for trial.

May 1, 1968

In the Circuit Court of Cook County. List of witnesses filed by state.

May 21, 1968

In the Circuit Court of Cook County. Motion of Thomas Kirby to Suppress the Identification Testimony of Witnesses.

In the Circuit Court of Cook County. Motion of Thomas Kirby to Suppress Physical Evidence.

June 27, 1968

In the Circuit Court of Cook County. Notice filed by state requiring Thomas Kirby to state his intention to assert the defense of alibi.

DOCKET ENTRIES

July 31, 1968

In the Circuit Court of Cook County. Plea of Not Guilty entered by Thomas Kirby. Jury called and sworn.

In the Circuit Court of Cook County. Hearing on Motion to Suppress Physical Evidence.

In the Circuit Court of Cook County. Hearing on Motion to Suppress Identification Evidence.

August 1, 1968

In the Circuit Court of Cook County. Opening arguments of counsel. Testimony of witnesses heard. Age of Thomas Kirby is 35 years. Motion of Thomas Kirby for directed verdict at close of People's case.

In the Circuit Court of Cook County. Motion for directed verdict denied. Further testimony of witnesses heard. Verdict of jury finding Thomas Kirby guilty as charged in the indictment.

In the Circuit Court of Cook County. Judgment entered on finding of guilty. Motion by Thomas Kirby for a new trial. Order denying motion for new trial. Motion of Thomas Kirby in Arrest of Judgment. Order denying motion in arrest of judgment.

In the Circuit Court of Cook County. Thomas Kirby sentenced to the Illinois State Penitentiary for not less than five nor more than twelve years.

August 9, 1968

In the Circuit Court of Cook County. Notice of Appeal by Thomas Kirby.

In the Circuit Court of Cook County. Motion by Thomas Kirby for appointment of counsel on appeal other than the public defender.

In the Circuit Court of Cook County. Order allowing motion for appointment of counsel. Order setting appeal bond at \$20,000.

DOCKET ENTRIES

November 26, 1968

In the Appellate Court of Illinois, First District. Record filed on appeal.

December 16, 1969

In the Appellate Court of Illinois, First District. Oral arguments heard.

March 10, 1970

In the Appellate Court of Illinois, First District. Opinion of court affirming judgment entered below filed.

May 4, 1970

In the Supreme Court of Illinois. Petition for Leave to Appeal filed by Thomas Kirby.

October 5, 1970

In the Supreme Court of Illinois. Order denying Petition for Leave to Appeal.

December 3, 1970

In the Supreme Court of the United States. Petition for a Writ of Certiorari to the Appellate Court of Illinois filed. Motion to proceed *in forma pauperis* filed.

May 24, 1971

In the Supreme Court of the United States. Motion to proceed *in forma pauperis* granted. Writ of Certiorari granted.

MOTION TO SUPPRESS IDENTIFICATION TESTIMONY OF A
WITNESS FILED IN THE CIRCUIT COURT OF COOK
COUNTY ON MAY 21, 1968

Now comes the defendant, Thomas Kirby, by his attorney, GERALD W. GETTY, Public Defender of Cook County, through Howard Abrams, Assistant Public Defender, and moves to suppress the identification testimony of any witness in this cause alleging that the confrontation wherein the defendant was identified violated the Constitutional Rights of defendant, in that:

1. The identification by the identification witness was induced by the actions of the police. The manner in which the police acted directly caused the identification witness to point out the defendant in violation of his Constitutional Rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.
2. Defendant was not advised of his right to have counsel present with him at the time of the police confrontation in violation of his Constitutional Rights under the Sixth Amendment of the Constitution of the United States.

In support of defendant's contention, defendant cites the cases of *Stovall v. Denno*, 388 U.S. 250, (1967); *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*; 388 U.S. 263 (1967).

WHEREFORE, defendant prays that this Honorable Court suppress the identification testimony of any witness in regard to identification of the defendant.

GERALD W. GETTY
Public Defender of Cook
County

By: /s/ Howard Abrams
Assistant Public Defender"

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STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

Indictment No. 68-1223

Charge: Robbery, etc.

THE PEOPLE OF THE STATE OF ILLINOIS

—vs—

RALPH BEAN, KIRBY THOMAS

REPORT OF PROCEEDINGS—July 31, 1968

[fol. 3]

RALPH BEAN,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q Would you state your name and address, please?

A Ralph Bean, 2100 West Warren.

Q Mr. Bean, calling your attention to February 22, 1968, were you in the vicinity of 2200 West Madison?

A Yes, I was.

Q And who were you with?

A Kirby Thomas.

Q What, if anything, happened while you were in the area of 2200 West Madison?

A We were walking west on Madison Street and we was stopped by two police officers.

Q Were you placed under arrest at that time?

A No, we was stopped for questioning

Q What was the questioning in regard to?

A They didn't give me any reason at all. They merely stopped us and asked us who were we.

Q What, if anything, did they do then?

[fol. 4] A He asked me my name and asked did I have any identification.

Q And what happened then?

A Well, I gave him identification stating who I was and he returned it back to me, and I stood right there by the car.

Q Did he show you a warrant for your arrest?

A No, he didn't.

Q Did you commit any crime just prior to this?

A No.

Q And what, if anything, did he do after that; the police officers?

A Well, after that, they questioned the fellow I was with, and they placed us in the car—told him to get in the car, and the other officer said for me to get in the car, too.

Q Were you placed under arrest at that time?

A Yes, I assume we were.

Q Did the police take anything from you?

A Yes, they did.

Q What was taken from you?

A Some identification.

Q Where was the identification at?

A In my pocket, my coat pocket.

[fol. 5] Q And in what manner did the police obtain possession of this identification?

A He just went in my pocket and took it out.

MR. BEAN: That's all I have.

CROSS EXAMINATION

By Mr. Pomaro:

Q Mr. Bean?

A Yes, sir.

Q When the police officers stopped you on the street, what did they say to you?

A He said, "police officers."

Q And did they show you a picture?

A No.

Q Did they tell you that you resembled a suspect in a picture?

A No, he didn't.

Q Did they ask for your identification?

A Yes, he did.

Q And did they subsequently retrieve some identification?

A Yes.

Q And did that identification have your name on it?

A No.

[fol. 6] Q It had the name of Mr. Willie Shard, didn't it?

A That's correct.

Q And they recovered some traveler's checks, also, I believe, from you?

A No.

Q What else did they take from you besides identification?

A That's all.

MR. BEAN: Objection. It is irrelevant on a motion to suppress.

THE COURT: All right, he's answered.

MR. POMARO: Q The identification they did take from you had the name of Willie Shard on it?

A Yes.

Q Your name is not Willie Shard, is it?

A No.

MR. POMARO: Nothing further.

THE COURT: Anything further of this witness?

MR. BEAN: No, your Honor.

THE COURT: You may step down.

(Witness excused.)

[fol. 7] KIRBY THOMAS,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q State your name and address?

A Kirby Thomas.

Q Were you in the area of 2200 West Madison on February 22, 1968?

A I was.

Q And were you stopped by the police at that time?

A I was.

Q And what, if anything, did the police say to you when they stopped you?

A They asked--they identified themselves.

Q And did they tell you they had a warrant for your arrest?

A No.

Q Did they state they had seen you commit a crime in their presence?

A No.

Q What happened after the police stopped you?

A They began to search my person.

MR. BEAN: That's all I have.

[fol. 8] CROSS EXAMINATION

By Mr. Pomaro:

Q Did they recover anything when they searched your person?

MR. BEAN: I will object to this as to relavancy. The only question is whether or not the search was legal.

THE COURT: If there was no recovery on the search there is no occasion to suppress anything. What are you going to suppress?

MR. POMARO: Q Did they recover anything when they searched your person?

A Well, when they went through my personal identification they recovered some travelers checks.

Q And the personal identification didn't have your name on it, did it?

A It certainly did.

Q It did? Are you sure about that?

A I certainly am.

- Q Did those travel checks have your name on them?
A No, they didn't.
Q Whose name did they have on them?
A Shard.
Q Willie Shard; right? Did he tell you that you and [fol. 9] your partner resembled a picture of a wanted man?
A No.
Q Wanted for robbery?
A No.
Q They didn't tell you that?
A No.
Q You didn't know that?
A Would you repeat that?
Q Did you know that?
A Did I know what?
Q That either you or your partner resembled the picture of a wanted man for robbery? Did you know that? For a con game; did you know that?

A Well, I had a hearing on March 24th or 25th in Branch 44. This is when I was informed of that.

Q You didn't know it then?

A No.

MR. POMARO: Okay. Nothing further

MR. BEAN: No redirect.

THE COURT: You can step down.

(Witness excused.)

[fol. 10] BIAGGIO PANEPINTO,

called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pomaro

- Q State your name, sir?
A Officer Biaggio Panepinto.
Q What is your business or occupation?

A I work for the Public Vehicle Department, City of Chicago Police Department.

Q And how long have you been so employed?

A Of this unit?

Q By the Chicago Police Department?

A I am going on my 11th year.

Q What is your badge number?

A 6893.

Q Will you speak into the microphone, please.

Calling your attention to February 22, 1968, were you so assigned?

A Yes, I was.

Q Officer, calling your attention to that date, did you have occasion to be on duty in a squadcar?

A Yes, I was.

Q And did you have occasion to see the defendants [fol. 11] Dean and Kirby?

A On that day, yes, I did.

Q And do you see them in Court today?

A Yes, sir, I do.

Q Point them out, please?

A The two gentlemen sitting there. (Indicating)

MR. POMARO: Indicating for the record the defendants Bean and Kirby.

Q And where were you at the time you saw them, sir?

A At this time my partner and I were eastbound and—

Q Were you on foot or in a squadcar?

A We were in a squadcar, unmarked car.

Q What was your partner's name?

A Officer James Rizzi.

Q All right. What happened next?

A At this time we were eastbound in the 2200 block when we first observed the two gentlemen.

Q And what happened next?

A Well, at this time I told my partner, I said, "Gee, that looks like Alphonzo Hampton who is wanted in the first area for con game. And I make a "U" turn and we stopped the two defendants at 2214 West Madison Street.

Q And how did you happen to become aware of this [fol. 12] Alphonzo Hampton?

A The police department issues daily bulletins every day, and I had one of those bulletins in my possession that they issued.

Q Did this bulletin contain a photograph of this suspect?

A It did.

Q And where was this bulletin?

A This bulletin was on my clipboard.

Q The clipboard was with you in the vehicle?

A Yes, sir, it was.

MR. POMARO: Mr. Reporter, please mark this Respondent's Exhibit 1, for identification.

(Thereupon, a photograph was marked by the reporter as Respondent's Exhibit 1, for identification.)

MR. POMARO: Q I show you what has been marked as Respondent's Exhibit 1, for identification, a photograph, and ask you to look at that. Have you ever seen that before?

A Yes, I have.

Q And where was that, sir?

A This was at the time, in the squadcar.

Q And is that the photograph in the police bulletin [fol. 13] that you have spoken about previously?

A That's correct.

Q And is that in the same condition now as it was on the date and time in question?

A It is.

Q Now, may I have that back.

Does that photograph resemble one of the two defendants?

A Yes, it did.

Q And which defendant?

A Kirby Thomas.

Q What happened next, Officer?

A At this time we stopped them and identified ourselves. We asked them to identify themselves, too.

Q What did they say to you, if anything?

A. We asked them to show some identification and at this time Kirby—I questioned Kirby Thomas and he took his wallet out, and as he was looking for identification I noticed three travelers checks with the name of Willie on it. And I asked who these belonged to. And he said, "Oh, that's play money." So I said, "Would you let me see them", so he showed them to me and it had Willie [fol. 14] Shard on there. I said, "Who is Willie Shard?" He said, "I won it in a crap game."

At this time we asked them to show more identification and I noticed a social security card with Willie Shard on it, too. So we ordered them into the auto.

Q. Was the other suspect, Mr. Bean, searched?

A. Mr. Bean was also searched by my partner, and I was present. And in his possession he had a blue cross and blue shield membership card with Willie Shard on it, a Greyhound receipt for a ticket, also a prescription card from a drug store, and also a social security duplicate of Willie Shard.

Q. Was Mr. Bean asked for identification?

A. He was.

Q. And what was his reply?

A. He had no identification with his name on it.

MR. POMARO: Your witness.

CROSS EXAMINATION

By Mr. Bean:

Q. Officer, do you keep all these daily bulletins with you in the squadcar?

A. I do.

Q. And this bulletin was issued in July, 1967, is that [fol. 15] correct?

A. That's correct.

Q. All right. Now, under the suspect you have here of Alphonzo Hampton, you have a description, is that correct?

A. That's correct.

Q. And what is the desription?

A. Male, negro, 35, 5 foot 2, 125 pounds, slender build, medium, dark complexion.

MR. BEAN: Would you stand up, Officer.

Q What would you say the height of Mr. Kirby is?

A Just by looking at him, I would say he is about five, five.

Q Now, Officer, you say you asked Mr. Kirby for identification and he showed you identification?

A Well, he started to show me when I first noticed the travelers checks.

Q And in what manner were the travelers checks in the wallet, Officer?

A In what manner?

Q Yes. How were they in the wallet?

A They were longways, full length in the wallet. As he opened it up I noticed the name.

Q Had you ever at any time prior to that taken the [fol. 16] wallet out of the defendant's hand?

A Yes. Not at that time. This was done at Area 4, robbery.

Q And prior to the time you placed the defendants under arrest, did you search them for weapons or anything?

A Before we placed them under arrest?

Q Yes.

A No.

Q And when you first stopped them, Officer, did you ask them if they were, if the defendant Kirby was Mr. Hampton?

A The first time I asked him, I said, "Are you Alphonzo Hampton?" He said, "No." I said, "You sure look like Hampton." I said, "Show some identification."

Q You never at any time took, the wallet out of the defendant's possession before you saw the travelers checks?

A No, I did not.

MR. BEAN: That's all I have.

MR. POMARO: No further questions.

(Witness excused.)

MR. POMARO: Call Officer Rizzi to the stand.

[fol. 17]

JAMES RIZZI

called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Palmaro:

Q State your name, please?

A Officer James Rizzi.

Q What is your business or occupation?

A Police Officer, City of Chicago.

Q How long have you been so employed?

A Eleven years.

Q What is your badge number?

A 7515.

Q And what is your current assignment?

A Public Vehicle Unit.

Q Calling your attention to February 22, 1968, were you so assigned?

A Yes, I was.

Q Calling your attention to that date, did you have occasion—were you on tour in your squad car that day?

A Yes, we were.

Q And with whom were you in the squadcar?

A With one Officer Panepinto.

[fol. 18] Q And did you have occasion to see the defendants here on trial today, Mr. Bean and Mr. Kirby?

A Yes.

Q Do you see them in court today?

A Yes, I do.

Q Will you point them out, please?

A The two colored gentlemen sitting there. (Indicating)

MR. POMARO: Indicating for the record, the defendants Bean and Kirby.

Q Would you please tell us what, if anything occurred, at the time you saw the defendants?

A We were eastbound and approaching the 2200 block, and my partner says, "Gee that guy looks like Hampton."

And as we made a "U" turn to come back then we stopped and questioned these gentlemen.

Q And did you get out of your squadcar, sir?

A Yes, I did.

Q Did your partner get out of the squadcar?

A Yes, he did.

Q What, if anything, was said at that time?

A He asked Kirby for identification. First he said, "Are you Hampton?" And he said, "no." He said, "Let me see some identification."

[fol. 19] Q What happened then?

A Well, Kirby pulled out a wallet, a block wallet, and then my partner said something about some checks. I was watching Bean.

Q What happened next, if anything?

A Well, then I asked Bean for his identification. He said he didn't have any, and I went and searched him.

Q And what did you find, sir?

A In his coat pocket I found some identification. And he had a blue cross card with Shard's name on it, and a Greyhound bus ticket and a prescription, medical prescription with Shard's name on it, and he had a social security card, blank, to the other part of the social security card.

Q Did you ask him what his name was?

A Yes.

Q What did he tell you?

A Bean.

Q Did he have any explanation for the identification of another person?

A At the time I believe he said he found it. I am not sure now.

MR. POMARO: Thank you, Officer. Your witness.
[fol. 20]

CROSS EXAMINATION

By Mr. Bean:

Q Officer, you have been in Court during the time your partner testified just previously?

A Yes.

Q Officer, did you show either one of the defendants this daily bulletin?

A My partner did.

Q He showed it to them?

A Yes.

MR. BEAN: That's all I have.

MR. POMARO: Nothing further.

THE COURT: Step down.

(Witness excused.)

[fol. 25]

RALPH BEAN,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Bean:

Q State your name and address?

A Ralph Bean, 2100 West Warren.

Q You were arrested on this charge, is that correct, and charged with robbery?

A There never was any charge, they merely said for investigation.

Q Did the police officers inform you that you had a right to have an attorney present prior to be identified by the victim?

A No, they didn't.

MR. BEAN: That's all I have, Judge.

MR. POMARO: No questions.

(Witness excused.)

[fol. 26]

KIRBY THOMAS,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

— By Mr. Bean:

Q You are the same Mr. Kirby that was previously sworn?

A Yes.

Q You understand you are still under oath?

A Yes.

Q Would you state your name and address, please?

A Kirby Thomas.

Q And after you were placed under arrest on February 22nd, were you advised of your right to have an attorney present prior to being identified?

A No.

MR. BEAN: That's all, your Honor.

MR. POMARO: No questions.

(Witness excused.)

[fol. 50]

WILLIE SHARD,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pomaro:

Q State your name, please?

A My name is Willie Shard.

Q Spell your last name, please?

A S-h-a-r-d, Shard.

Q Mr. Shard, would you speak more slowly and loud and clear, so the ladies and gentlemen can understand you and hear you.

A Yes.

[fol. 51] Q Where do you live?

A 2120 West Washington Boulevard.

Q Slow down, Mr. Shard.

Are you employed, Mr. Shard?

A Right.

Q And by whom are you employed?

A Artistic Wood Specialty.

Q Artistic Wood Specialty.

A Wood working.

Q And how long have you worked for them, Willie?

A Eight years.

Q Willie, calling your attention to February 20, 1968, about four-thirty in the afternoon, do you remember where you were then?

A Yes, I do.

Q Where were you, Willie?

A I was on Hoyne Street going toward Warren, between Warren and Madison, on Hoyne.

Q You were on Hoyne Street between Madison and—

A And Warren.

Q And you were walking towards Warren?

A Correct.

Q Was this going north or south?

A I was going north.

[fol. 52] Q What side of the street were you on?

A On the west side of the street.

Q And where were you going?

A I was going from a friend, to the restaurant.

Q To a restaurant?

A Yes.

Q And did anything unusual happen at that time?

A Yes, sir, it did.

Q What was that, Willie?

A Well, I looked back and I seen two men. I didn't know exactly whether they were following me or what. I seen them coming down the street. I seen them about fifteen feet away from me.

Q Did you look at both the men?

A Yes, I looked at both the men.

Q Did you see the men?

A Did I see them?

Q Yes.

A Yes.

Q All right. What was the weather like that day? Was the sun shining or was it raining?

A No, all I know it was day time, around, about four-thirty.

Q Was it bright out?

[fol. 53] A Yes, it was light.

Q Did you see the men well?

A Yes.

Q What happened then, Willie?

A Well, when I stepped off the sidewalk, took a step up the steps to go into the restaurant, I don't know which one it was, but one of them ran up and grabbed me.

Q Where did he grab you?

A Around my neck.

Q What happened next, Willie?

A The next one went into my pockets and taken everything I had.

Q And what did they take out of your pocket, Willie?

A Well, they taken \$140 in travelers checks and around, about thirty or thirty-five dollars in cash, my wallet and all my identification cards.

Q What happened next, Willie?

A Well, when they turned to leave they went north on Hoyne Street.

Q What direction did you go, Willie?

A Well, I turned around and went back towards Madison.

Q You went south?

[fol. 54] A Correct.

Q You went in the opposite direction, is that correct?

A What is that?

Q You went in the opposite direction they went, is that correct?

A Right, correct.

MR. POMARO: Mr. Court Reporter, would you please mark this as People's Exhibit 1, for identification.

(Thereupon, said item was marked by the reporter as People's Exhibit 1, for identification.)

MR. POMARO: Q Mr. Shard, I show you People's Group Exhibit 1, for identification, purporting to be a social security card and three travelers checks, and ask you if you have ever seen this before?

A Yes, I have.

Q And whose social security card is that?

A That's mine, belongs to me.

Q These are your travelers checks?

A Yes.

Q Whose name appears on those travelers checks?

A Willie Shard.

Q How many travelers checks are there, can you see?

[fol. 55] A Three.

Q And how much is each one of them?

A Twenty dollars each.

Q And that's your signature on those travelers checks?

A Correct.

Q And are these in the same condition now as when you last saw them?

A Yes, they are.

Q These are the ones taken from you in the robbery?

A Correct, right.

Q All right, thank you.

Willie, after the men robbed you and they went north and you went south on Hoyne, what happened next?

A I walked over to the drive store. In fact, I seen an officer coming down the street, a police car, and I whistled for him. I guess he must not have heard me. So I went into the drug store.

Q Did you have any money on you at this time?

A Not a penny. I went into the drug store and a gentleman there I had known for a long time, about twenty years, so I got car fare from him and I went back to where I was living 909 West Madison—901 West [fol. 56] Madison.

Q Did you eventually go to the police station?

A No, because I didn't have any money. I went the next day.

Q Did you go to the police station the next day?

A The next day I walked.

Q You walked to the police station?

A Yes.

Q How far did you walk?

A I walked from Madison over to Clark Street and Chicago Avenue.

Q And did you report the crime there?

A Yes, I did.

Q All right. Now, Willie, calling your attention to February 22, 1968, did you receive a call from the police asking you to come down to the station?

A Yes, I did.

Q And when you went down to the station, was that the Maxwell Street Police Station?

A Correct.

Q When you went down there, what if anything, happened, Willie?

A Well, I seen the two men was down there who robbed me.

[fol. 57] Q How did that happen? Who did you go to the police station with?

A I didn't get that.

Q Who took you to the police station?

A The policeman picked me up.

Q And did any of them tell you—

MR. BEAN: Objection, Judge.

THE COURT: Sustained.

MR. POMARO: Q When you went to the police station did you see the two defendants?

A Yes, I did.

Q Do you see them in Court today?

A Yes, sir.

Q Point them out, please?

A Yes, that one there and the other one. (Indicating)

MR. POMARO: Indicating for the record the defendants Bean and Kirby.

Q And you positively identified them at the police station, is that correct?

A Yes.

Q Did any police officer make any suggestion to you whatsoever?

MR. BEAN: Objection, Judge.

[fol. 58] THE WITNESS: No, they didn't.

THE COURT: I'll let it stand.

MR. POMARO: Q These events that you testified to, Willie, did they occur in the City of Chicago, County of Cook and State of Illinois?

A I didn't get that.

Q The matters that you have testified to, did they occur in Chicago, Cook County, Illinois? Did these things happen in Chicago?

A Yes.

Q Cook County?

A Yes.

Q And Illinois?

A Right.

MR. POMARO: Thank you.

MR. BEAN: May I have a side bar conference, your Honor?

(Thereupon, the following proceedings were had outside the hearing of the jury:)

MR. CUSICK: Let the record reflect that we have submitted a copy of a police report and the Grand Jury testimony applicable to this case to defense counsel at this time.

(Thereupon, the following proceedings were had with [fol. 59] in the presence and hearing of the jury:)

CROSS EXAMINATION

By Mr. Bean:

Q Mr. Shard, just before this happened that you were robbed, where had you been before that?

A I had been to New Orleans.

Q I mean, on the day that this happened, where were you coming from?

A I had come back from New Orleans.

Q And you were coming from the airport or where?

A No, Greyhound Bus Station.

Q And these people that robbed you, they were walking behind you, is that correct?

A Yes, they was behind me. I didn't know exactly was they following me or not. I remember seeing them behind me. I looked back.

Q You stated on direct examination that you got a real good look at them?

A Yes, I did.

Q How was that? Were they close to you when you turned around, or what was the condition for you to get a good look at them?

A I would say they were about the distance from me [fol. 60] to where you are standing.

Q And they were that far when you turned around and looked at them?

A Yes.

Q After this happened, the next day you went down to the police station, is that correct?

A Correct, next morning.

Q The next morning. Now, did you give the police a description of these people?

A Yes, I did.

Q And how did you describe them to the police?

A Well, I don't know, I said they were both about the same height, I said about five, six or five, seven, something like that.

Q And anything else?

A I said they was brown skinned, dark brown skin, about 140, 150 pounds, something like that.

Q So you told the police they were five feet six inches tall?

A Something like that.

Q And each weighed what?

A What?

Q How much did each of them weigh?

[fol. 61] A Around, about 150, 140 or 150.

Q 140 to 150 pounds?

A Right.

Q That's what you told the police?

A Yes.

Q And the police made a report on it?

A Right.

Q Did you tell the police what they were wearing, or anything?

A Well, no, I didn't see correctly what they was wearing, how they was dressed.

Q You didn't observe what they were wearing, regarding their clothing, trousers, or anything?

A Right.

Q You didn't see what they were wearing?

A No.

Q You looked at them when they were going away, right?

A I was headed north on Hoyne and they was headed in the same direction, going towards Hoyne.

Q Now, on the 22nd, the day after you reported it, you went down to the police station. Who took you to the police station?

A The policeman picked me up.

[fol. 62] Q And who was that policeman?

A Well, I really doesn't know the name, I forget the name, but I know the Maxwell Street Police Station. This gentleman. (Indicating)

Q This police officer in Court now?

A Yes, and his friend.

Q And what did they tell you whenever they picked you up?

A They didn't tell me anything. They just asked me was I robbed and I said, "yes." They said, they asked me did I know them if I seen them and I told them "yes."

Q When did this happen; down at the police station?

A No. When they picked me up they asked me the questions. They said, were you robbed and I said "yes."

Q What else?

A Could I identify them and I told them "yes".

Q All right. Then I presume you went down to the police station?

A They was sitting down there when I first walked in.

Q They were sitting down?

A Yes, at the desk, that's right.

Q And did the police officers say anything to you?

[fol. 63] A They asked me to point them out and I pointed them two guys out.

Q They asked you if these were the ones?

A Right.

Q How many other people were sitting there?

A I didn't pay much attention.

Q They asked you if these two, Kirby and Bean, were the ones?

A Correct, yes.

THE COURT: Would you repeat the question, Mr. Court Reporter.

(Question read by the reporter as follows: "They asked you if these two, Kirby and Bean were the ones?")

MR. BEAN: Q Now, before that, before they asked you if Kirby and Bean were the ones, did they ask you if two other people were the ones that robbed you?

A Did they ask me what?

Q Did they ask you—did they point out two other people and ask you if they were the ones who robbed you?

A No.

Q They just asked you if Kirby and Bean were the [fol. 64] ones?

A Yes.

Q Now, whenever you gave a description to the police, they took all this down, is that correct?

A What is that?

Q Whenever you gave a description, on the 21st, the day after you were robbed, you gave a description of the people who robbed you to the police?

A Right.

Q And he took all this down?

A Yes.

MR. CUSICK: Objection. There would be no way he would know what the police took down.

THE COURT: Sustained.

MR. CUSICK: We ask that the answer be stricken.

THE COURT: The answer is stricken and the jury is instructed to disregard it.

MR. BEAN: Q Do you recall testifying, Mr. Shard, at a preliminary hearing on the 25th of March, before Judge Ryan down on the fourth floor here?

A Yes.

Q You testified there?

A Yes.

Q And you were under oath there as you are here, [fol. 65] is that correct?

A Right.

Q All right. Did you answer the question of the State's Attorney down there, "Did you see either or both of the men at the time?" Your answer is, "When I looked back I seen them but I didn't pay any attention. I was going to get me something to eat. The minute I stepped on the sidewalk, one of them run and grabbed me around the neck"?

A Right.

Q "What did they do? "Both of them ran their hands in my pocket and taken my money".

A Right.

Q That is what you testified to there?

A Correct.

Q You also testified at the Grand Jury?

A Correct. That was on the 5th of April.

Q Pardon me?

A That was on the 5th of April, the Grand Jury.

Q Right.

A On Friday, yes, I remember.

Q You stated there, "I was going between Warren and Madison and I happened to look back and I seen two guys coming but I didn't know what was going on"? [fol. 66]

A Yes.

Q "By the time I stopped off the street to get something to eat, I didn't know which one it was, but one of them ran up and grabbed me around the neck."

A Yes.

Q Did these people grab you from behind?

A Yes, they did.

Q But you did see enough of them so you could give the police a description?

A Yes, I did.

Q Now, did the police, when they took you down to the police station, say they had two suspects they wanted you to look at?

A Never told me that. There was some more people in there but I wasn't paying attention.

Q But they told you they had two suspects for you to look at?

A Yes, correct.

Q Did they tell you anything else, that some travelers checks had been found on them?

A No.

Q Now, before you testified here, did you talk at any time with the State's Attorney?

A more than here.

[fol. 67] Q Before testifying today, did you have any discussion with them?

A Yes.

Q And when was that?

A Well, yesterday, today, and I think the last time I was here on the 5th of April.

Q And about how long a time did you spend with the State's Attorney?

A I didn't pay no attention to the time. I know we was sitting down talking.

Q Was it an hour?

A I wouldn't say, exactly. I could have been maybe that long and maybe longer, or shorter.

Q But you say you got a good enough look at the persons to give the police a description?

MR. CUSICK: Objection.

THE COURT: Sustained. Asked and answered.

MR. BEAN: That's all I have.

REDIRECT EXAMINATION

By Mr. Pomaro:

Q Willie, how tall are you?

A Five—simething between five, four and five, five.

Q What do you weigh, Willie?

A About 117, 120.

[fol. 68] Q Willie, when you looked back, when you were walking down the street and first saw the defendants, when you looked back, did you see them then?

A Yes, I seen them.

Q Did you get a good look at them then?

A Yes, I did.

Q All right. Now, when they grabbed you and took your money, did you see them then?

A Yes, I did.

Q Did you get a good look at them then?

A Yes.

Q Both of them?

A Correct.

Q When they walked away did you see them then?

A Yes.

Q Did you look at them, Willie?

A Yes.

Q Did you get a good look at them?

A Yes.

Q Are those the same two fellows? Look at them, Willie.

A Correct.

Q Are those the same two that robbed you?

A Yes.

[fol. 69] Q You are sure, Willie?

A Yes.

Q Willie, I talked to you this morning about this case, didn't I?

A Yes.

Q And I talked to you yesterday about this case, didn't I?

A Right.

Q And did I ever tell you what to say?

A No.

Q Did I ask you questions?

A Yes, you asked me questions.

Q Did I ever tell you what to say?

A No, you haven't.

MR. POMARO: Thank you. Nothing further.

THE COURT: Anything further, Mr. Bean?

MR. BEAN: Nothing else.

THE COURT: You may step down.

(Witness excused.)

MR. CUSICK: The State will call Officer Rizzi.

[fol. 70]

JAMES RIZZI,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Cusick:

Q State your name, please?

A Officer James Rizzi.

Q And how do you spell your last name?

A R-i-z-z-i.

Q What is your occupation?

A Police officer, City of Chicago.

Q How long have you been on the force?

A About 11 years.

Q Were you so employed on the police force during the month of February, 1968?

A I was.

Q Calling your attention to February 22, 1968, at about eleven o'clock in the morning, where were you?

A We were westbound on Madison Street.

Q And were you in a squadcar?

A Yes, we were.

Q Who were you with?

A My partner, Officer Panepinto.

[fol. 71] Q Who was driving the car?

A I was.

Q And what, if anything, occurred there?

A Well, we were going east on Madison Street, approaching the 2200 block and my partner says, "there goes a guy that looks like he's on the Daily Bulletin, a picture in the Daily Bulletin. I made a "U" turn and the two men were stopped.

Q Now, the two men that you stopped at that particular point, do you see them here in Court today?

A Yes, I do.

Q Would you point to them, please, and identify them?

A The one with the gray sweater is Kirby Thomas and the one with the red sweater is Ralph Bean.

Q Now, this was daylight, is that correct?

A Right.

Q When you got out of the car did you have a conversation with them?

A My partner did.

Q And who was your partner talking to?

A He was talking to Kirby Thomas.

Q And did you overhear anything that was said?

A Yes, I did.

[fol. 72] Q And what was said?

A He asked him to produce his identification, who he was.

Q And what happened?

A Well, he pulled out his wallet and he opened it up and there was three American Express Travelers Checks in the money part, in the folding part. My partner asked him, "What is this?" He said—

MR. BEAN: Objection, Judge, I think this is hearsay.

THE COURT: I beg your pardon?

MR. BEAN: Objection, hearsay.

THE COURT: Is this in the presence and hearing of the defendant?

MR. CUSICK: That's right.

THE COURT: Is that right?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead. Overruled.

THE WITNESS: He said, "What is this?" He said, "This is play money." My partner pulled the check out and read Willie Shard, and he said, "Who is Willie Shard?" He said, "Oh, I won it in a crap game."

MR. CUSICK: Q And what happened next?

A The two men were placed under arrest and transported to the fourth area.

[fol. 73] Q When you arrived at the station—first of all, let me show you People's Group Exhibit 1, for identification. Does this look in any way similar to anything you have ever seen before? Examine it, please.

A Yes.

Q And what does it resemble?

A It resembles the checks.

Q Is there a name of the travelers checks?

A Yes.

Q And whose name is that?

A Willie Shard.

Q And do you see anything else there besides the travelers checks?

A Yes, a social security card.

Q And whose name is on the social security card?

A Willie Shard.

Q And where was this recovered initially?

A Off Ralph—I mean Kirby Thomas' wallet.

Q Officer, when you arrived back at the station, did you make an investigation to determine if these checks had been stolen or not?

A Yes, I did.

Q And what did your investigation reveal?

A Our investigation revealed that the checks were [fol. 74] taken in a robbery of Willie Shard.

Q Now, were the defendants brought to any particular room inside the station?

A Just a big open room, near the window.

Q Were they standing or seated?

A They were seated.

Q Now, later on, or sometime later, did you eventually see Mr. Shard walk into the police station?

A Yes, sir, a couple of hours later.

Q And when he walked in, will you describe what happened?

A He walked in and he said, "Those are the two men that robbed me."

Q Now, did anyone prompt him or coach him prior to his walking in the room, if you know?

A No, sir.

Q And what did he say the instant he walked in the room and saw them?

A He said, "These are the two men that robbed me."

Q Did you direct the two men to stand up?

A After that, yes.

Q And what happened next?

A He said, "These are the men."

Q Now, everything you testified to occurred in the [fol. 75] City of Chicago, County of Cook, State of Illinois?

A Yes, sir.

MR. CUSICK: Your witness.

CROSS EXAMINATION

By Mr. Bean:

Q Now, Officer, were you involved in this case prior to the 22nd, which was two days after the robbery?

A No, sir.

Q So you did not take down any police reports that the complaining witness made on the 21st?

A No, sir.

Q Whenever you brought the complaining witness down to the police station, did you tell him for what reason you were bringing him down there?

A I didn't bring him down there. I mean, you mean the defendants?

Q I'm sorry, I mean the complaining witness, Mr. Shard?

A I didn't bring him.

Q You did not bring Mr. Shard down there?

A No.

MR. BEAN: That's all I have, your Honor.

THE COURT: Anything else?

[fol. 76] MR. CUSICK: Nothing further.

THE COURT: You may step down.

(Witness excused.)

MR. CUSICK: At this time the State will call Officer Panepinto.

BIAGGIO PANEPINTO,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Cusick:

Q Officer, State your name and area assignment?

A My name is Biaggio Panepinto and I work for the Public Vehicle Unit, Chicago Police Department.

THE COURT: Just a moment. Will you spell you name, please, slowly.

THE WITNESS: First name, B-i-a-g-g-i-o. My last name is P-a-n-e-p-i-n-t-o.

MR. CUSICK: Q And how long have you been with the police department, sir?

A October 1st, it will be eleven years.

Q October 1, 1968?

A 1968.

Q Were you so employed during the month of February [fol. 77] 1968?

A I was.

Q And calling your attention specifically to February 22, 1968, were you at or near the 2200 block of west Madison Street?

A Yes I was.

Q And approximately what time was that?

A Approximately eleven a.m.

Q In the morning?

A In the morning.

Q And were you driving or a passenger?

A I was driving in an unmarked vehicle.

Q I see. And what happened next, if anything?

A Well, at this time we were in the 2200 hundred block of Madison Street when I observed the two defendants walking west on Madison Street, and I told my partner that one of the men looked like a man that was wanted on the Daily Bulletin.

Q And who was the man that was wanted on the Daily Bulletin; what was his name?

A His name was Alphonzo Hampton.

Q And when you thought that one of the defendants looked like Hampton, which defendant were you referring to?

[fol. 78] A Kirby Thomas, the man to my left, in the gray sweater.

Q In the gray sweater?

A Yes.

Q And who was with him at that time?

A Ralph Bean.

Q And do you see him in the Courtroom today, also?

A Yes, the man in the red jacket there. (Indicating)

Q Now, what happened next?

A And this time, my partner made a "U" turn, he was driving. And as we approached them we stopped the auto, and we approached the two defendants and we identified ourselves.

Q Did you have a conversation with Mr. Kirby?

A Yes, I did.

Q And what was the substance of that conversation?

A I asked him to identify himself, and he took his wallet out and as he opened his wallet I noticed American Express checks.

Q Did you ask him what they were?

A Yes, and he told me that they were play money. I said, "Let me see them." At the same time he pulled them out I took them from his hand, and I noticed it had the name of Willie Shard on it.

[fol. 79] Q What happened next?

A Then I asked him, "Where did you get these checks, these don't belong to you?" And he said that he won them in a crap game.

Q And did he later produce any identification for himself, for Mr. Thomas, I am referring to?

A Yes.

Q How did he identify himself?

A Would you repeat that again?

Q Well, I will withdraw that question.

Did Mr. Kirby Thomas identify himself as Mr. Kirby Thomas or as Thomas Kirby?

A Yes, he had another identification on him with the name Kirby Thomas.

Q I see. And the explanation for the travelers checks was that he won them in a crap game, is that correct?

A Yes.

Q Now, I will show you People's Group Exhibit 1, for identification, and ask you if you have ever seen that before?

A Yes, these are the same ones I took from Thomas Kirby.

Q And will you describe to the ladies and gentlemen [fol. 80] exactly what you have in your hand?

A It is an American Express Company check for the amount of twenty dollars.

Q How many checks are in there?

A There are three of them in here.

Q Made out to who?

A They are made out to—it is signed by Willie Shard.

Q Is there anything else in that exhibit besides the checks?

A Yes, there is a social security card with the name Willie Shard, and it is signed.

Q And you are positive that this Group Exhibit 1 is the same items that you took from the defendant, Mr. Kirby, at the scene of the arrest?

A It is.

Q Now, what did you do with the evidence that you recovered from the defendant, specifically People's Exhibit 1?

A We inventoried it and sent it down to the Custodian.

Q And when did you retrieve it?

A Yesterday, 31st of July.

[fol. 81] Q Now, when you returned to the station—was this the 22nd of February?

A Yes.

Q When you returned to the station did you make an investigation of the travelers checks?

A I didn't quite get you.

Q When you returned to the station, did you make an investigation of the travelers checks?

A Yes, I did.

Q And after your investigation what did you determine?

A That the American Express checks had been taken in a robbery for a man by the name of Willie Shard.

Q Were you interrogating the defendants in the police station?

A We were.

Q Subsequent thereto, did Mr. Willie Shard enter the room?

A We were talking to the two defendants when Willie Shard walked in.

Q What was the first thing that Mr. Shard said?

A He said the two men sitting at the table were the two men that robbed him.

Q And as far as you are concerned, did anybody [fol. 82] prompt him to identify him?

A No.

Q Was his identification instantaneous?

A Yes, it was.

Q And everything you testified to occurred in Chicago, Illinois, County of Cook?

A Yes, sir.

MR. CUSICK: Your witness.

CROSS EXAMINATION

By Mr. Bean:

A Officer, the reason you stopped Mr. Kirby and Mr. Bean was for another party who turned out not to be, is that correct?

A That's correct.

Q Now, after you called back down to the police station, Officer, you found out that Mr. Shard had filed a complaint with the police that he had been robbed, is that correct?

A Later, yes.

Q Now, did you look at his police report?

A I didn't have it at the time.

Q Well, did you look at it later?

A Yes, I did.

Q And he made out a police report on the 21st. And [fol. 83] is that the police report there, Officer?

A Yes, that is.

Q Now, Officer, calling your attention here, you have number of offenders and we have a description—

MR. POMARO: Objection to this, your Honor. This is not this police officer's report.

THE COURT: Is that his police report?

THE WITNESS: No, your Honor.

THE COURT: Did you make this?

THE WITNESS: No, your Honor.

THE COURT: Sustained.

MR. BEAN: Q You had the two defendants in the room when the complaining witness came down. What type of room was this, Officer?

A It is an open room, something of a courtroom order.

Q Large as this?

A Not quite as large.

Q Were there tables or what?

A Well, there were several tables alongside the window, and some chairs, and also there were other tables around. It is the headquarters, all the areas headquarters. [fol. 84] Q Were you sitting with both of the defendants at that time?

A Pardon?

Q Were you sitting with both of the defendants at that time?

A Yes, I was.

Q And then Mr. Shard came in?

A Yes.

Q And who else were you sitting with, Officer?

A I was sitting with my partner. We were the only two.

MR. BEAN: That's all I have, your Honor.

MR. CUSICK: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. CUSICK: May we be heard at side bar?

(Thereupon, a discussion was had between Court and counsel, outside the hearing of the jury and court reporter, after which the following proceedings were had within the presence and hearing of the jury:)

MR. CUSICK: The State at this time offers People's Exhibit 1, for identification, into evidence as People's [fol. 85] Exhibit 1.

THE COURT: All right. People's Exhibit 1, for identification, is admitted into evidence as People's Group Exhibit 1.

(Thereupon, People's Group Exhibit 1, marked for identification, was received in evidence as People's Group Exhibit 1.)

[fol. 90]

RALPH R. BEAN,

called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bean:

Q Would you state your name and address, please?

A Ralph Bean, 2100 West Warren.

Q Now, calling your attention to February 22—strike that.

Now, prior to the time you were arrested—strike that. Were you arrested on February 22nd?

A Yes, I was.

Q And in whose company were you arrested?

A In the company of Kirby Thomas.

Q Now, the police officers testified there were travelers checks on Mr. Kirby's presence at that time?

A That's right.

Q Do you know where Mr. Kirby got the travelers checks?

A Yes, I do.

Q And where was that?

A They were found.

Q And where were they found?

[fol. 91] A It was in the 2200 block, between Hoyne and Warren.

Q And how long was this before you were arrested?

A I would say about two hours or better.

Q And tell the ladies and gentlemen of the jury specifically where you found them?

A They were off the street in an alley.

Q Were they out in the middle of the alley or—

A No, it's kind of a gangway but it's not really a gangway.

Q Now, what happened after you were arrested?

A We were taken to the police station.

Q And what occurred there?

A Well, we were seated at a table and we were searched at the police station.

Q What happened after that?

A Well, while we were seated, Officer Rizzi, that I know right there, he was making a phone call to someone.

Q And who were you seated with?

A Kirby Thomas.

Q And was any other police officer besides Officer Rizzi there?

A Yes, it was Officer Panepinto there originally, and [fol. 92] there was two other officers that came.

Q Now, calling your attention specifically, did you see the complaining witness, Mr. Shard, arrive?

A Yes, I did.

Q And what, if anything, happened when he arrived?

A Well, when he came into the room—where we were sitting, we were facing an open door stairway, and when he came in there, he was just standing around, you know, looking just where to go.

Q What did you observe happen then?

A He was approached by someone I assumed to be a police officer.

Q What happened?

A And he brought him over to the table where we were.

Q All right, continue?

A And in the course of walking to the table, Mr. Shard, Willie Shard, as I know him, was saying something about "I don't know", or "I told you I can't identify", or something like that. I can't quote him exactly.

Q What happened after that?

A And one police officer says, "Well, these got to be the guys, they got your stuff," and he said—

[fol. 93] MR. CUSICK: Objection, your Honor, to this hearsay.

THE COURT: Sustained.

MR. CUSICK: I ask that the answer be stricken.

THE COURT: The answer will be stricken and the jury is instructed to disregard it.

MR. BEAN: Q What happened then?

A Well, after that we were taken to another room and another officer proceeded to inventory some of the things which were taken off of us.

Q All right. Did you see Mr. Shard before that?

A No.

Q Did you see him on February 20th?

A No, I didn't.

Q Do you know where you were on February 20th about four-thirty?

A No, I don't know exactly. I have been trying to pinpoint my actions, but I can't say exactly where I were.

Q Did you ever take anything from Mr. Shard?

A No.

MR. BEAN: That's all I have.

[fol. 94] CROSS EXAMINATION

By Mr. Cusick:

Q Mr. Bean, you were arrested on February 20th?

A No, I wasn't.

Q February 22nd, I'm sorry?

A Yes, I was.

Q And on February 22nd, were you informed of the nature of the crime; robbery? Did the police tell you that you were wanted for robbery?

A No, he didn't.

Q Well, when on February 22nd, did you find out you were charged with robbery?

A After we were taken to the police station.

Q In the police station on February 22nd?

A Yes, after they brought someone in.

Q Now, when you were informed that you were charged with robbery, were you also informed when the robbery allegedly took place?

A No.

Q Did they tell you when it took place, if it took place three weeks ago or a year ago?

A I don't remember.

Q Well, at that time—I know you don't remember now—but at that time, on February 22nd, were you told you were wanted in a robbery that occurred on February [fol. 95] 20th, two days earlier?

A No.

Q You were your apprised of this?

A No, I wasn't told I was wanted in a robbery.

Q Therefore, you quite conveniently can't remember where you were on February 20th, is that right?

MR. BEAN: Objection, your Honor.

THE COURT: Sustained.

MR. CUSICK: Q Now, were you employed at all during the month of February, 1968?

A Yes, I was.

Q And what day of the week were you arrested on, if you recall?

A I don't know the exact date but I know it was—

Q Could it have been a Thursday?

A I don't know the exact date, but it was the 22nd, I think that was Washington's birthday.

Q Could that have been a Thursday, the day of the week?

A I don't know.

Q Well, were you employed that week anywhere?

A Yes, I was.

Q What was the nature of your employment?

[fol. 96] A Well, I was involved in what you call a work project at St. Leonard's House.

Q And is this a full time job where you are there during the daytime hours?

A Yes, I am there during the daytime hours, and we have daily seminars during the afternoon.

Q Just answer yes or no. Now, on February 20th, that would have been a Tuesday and February 22nd would have been a Thursday, is that right?

A That's right.

Q Would you have been employed that Tuesday?

A Yes, I would have been.

Q Would you work that Tuesday?

A I would have worked at St. Leonard's House.

Q And do you have any time card that you would sign?

A No.

Q Did you have any type of payroll records that showed you received any pay for working there?

A Yes.

Q Do you have it here in Court with you?

A No, I haven't.

Q Does your attorney have them?

A No, he hasn't.

[fol. 97] Q Did you know you were going to be tried this week?

A Yes, I did.

Q Now, about what kind of a salary did you earn there?

A Maximum of \$25 a week.

Q Now, once again, though, you can't recall where you were at about four-thirty in the afternoon on Tuesday, February 20th?

A No, I can't.

Q Now, you lived at 2100 West Warren, which Warren is—actually, that's how far West Hoyne Avenue is, is that correct?

A No, Hoyne Avenue runs past Warren.

Q Well, is Hoyne Avenue approximately 2100 west?

A Yes.

Q And you heard the previous testimony that the robbery occurred between Madison and Hoyne Boulevard, on Hoyne, is that right, you heard that testimony?

A I think so, I am not sure.

Q The robbery in this case took place about half a block from where you were working that day, is that correct?

[fol. 98] A Yes, if that's where it occurred.

Q You state that on the 22nd of February when you were arrested, you found some travelers checks?

A Yes.

Q And where did you find them, again?

A Where did I find them?

Q Yes.

A I found them up in an alley in a gangway.

Q Now, what were you doing in the alley or gangway?

A Well, I stepped off the street to take a drink of alcohol.

Q And how far up the alley were these checks?

A I would estimate roughly 20 feet, I can't be precise.

Q Now, does this alley run north or south or east or west?

A West.

Q East and west?

A East and west.

Q And when you stepped off the street to step in the alley, what street would you have been stepping off of?

A I would have—I don't know the name of the street. It's a block west of Hoyne.

[fol. 99] Q Would that be Leavitt Street?

A That's right.

Q And were you on the east side of the street or the west side?

A I was on the north side. I was on the north side of the street.

Q You were on Leavitt, is that right?

A No, I wasn't—yes, I was on Leavitt between Warren and Madison.

Q Leavitt runs north and south, is that right?

A That's correct.

Q So what side of the street were you on?

A On the west side of the street.

Q Now, who were you with when you stepped into the alley?

A Kirby Thomas.

Q And you stepped in there to have a drink?

A Yes.

Q Did you have some whiskey on your person?

A Yes, I did.

Q And you lived pretty close to there, is that right?

A I beg your pardon?

Q You lived about a block away from this alley, is that right?

[fol. 100] A Yes, I did.

Q You didn't go home to drink, is that right?

A No, I didn't.

Q Now, tell me about this alley. Is this an alley that is pretty clean, clean from trash, or describe it for us?

A It's fairly clean, it's not cluttered up.

Q How far into the alley did you walk to have the drink?

A I would say about twenty feet, something like that.

Q And where, exactly, in the alley were the checks?

A They was laying—they was strewn on the ground.

Q How many checks were there?

A There was three.

Q And who picked them up?

MR. BEAN: Objection, Judge, it has been testified to.

THE COURT: I'll let him answer.

MR. CUSICK: Q Who picked the checks up?

A I did.

Q And what else did you pick up besides the checks, if anything?

A Some identification.

[fol. 101] Q Who was the identification of?

A It said Willie Shard.

Q Were these items just scattered around the alley or in a nice, clean pile or how were they?

A No, they was strewn around.

Q This was at four-thirty in the afternoon?

A No, it wasn't at four-thirty in the afternoon.

Q When did you pick these up?

A This was about a quater after nine or so, in the morning.

Q In the morning. Now, were these checks soiled in any way?

A They were folded up.

Q They were folded?

A When they were originally found, yes.

Q In half?

A And after laying there I wouldn't think they were clean.

Q I see. And you were arrested at eleven o'clock, is that right?

A At about eleven o'clock.

Q What did you do after you stepped in the alley and picked the checks up?

A Well, we examined them and came out of the [fol. 102] alley.

Q And then what did you do?

A And we came around the corner and proceeded west on Madison Street.

Q When were you arrested?

A When was I arrested?

Q Yes.

A I was arrested on February 22nd.

Q Now, you picked the checks up the same day, you allege, is that correct?

A Yes.

Q How much time after you picked up the checks were you arrested?

A I would say about an hour and a half or forty minutes, or so.

Q You started walking west on Madison Street from Leavitt, that is 2200 block on Madison, is that right?

A Yes.

Q And where did you go?

A We didn't get anywhere. We were walking when we was stopped by the police.

Q I see. What was the nature of your employment at the St. Leonard's House?

[fol. 103] A It's what is called a work project.

Q What did you do with the work project?

A Various jobs.

Q Such as?

A Cleaning, keeping the place clean.

Q Did you ever know Mr. Willie Shard from any other time or place prior to this occasion?

A No.

MR. CUSICK: No further questions.

MR. BEAN: I have nothing further, Judge.

THE COURT: You may step down.

(Witness excused.)

[fol. 109] HAROLD MARSICEK,

called as a witness on behalf of the People; in rebuttal, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pomaro:

Q State your name, please?

A Harold Marsicek.

Q Spell your last name, please?

A M-a-r-s-i-c-e-k.

Q What is your business or occupation?

A I am a detective, 4th Area, Robbery Section.

Q And by whom are you employed?

A City of Chicago.

Q And for how long have you been a police officer?

A I have been a police officer 26 years.

Q And how long have you been a detective?

A 19 years.

Q And what is your current assignment, Detective?

A Fourth Area, Robbery Section.

Q Were you so assigned on February 22, 1968?

A I was.

Q Calling your attention to that date, did you have occasion to see one Willie Shard?

[fol. 110] A I did.

Q And did you have occasion to accompany Mr. Shard to the Area 4, Robbery headquarters?

A I did.

Q And would you tell, please, what happened upon arrival at the Area 4 headquarters?

A The 4th Area Robbery Section is located on the second floor at that location, 947 West Maxwell Street. And as we walked to the top of the stairs, we were about to enter the squadroom, which is a large room. Seated across the room were two men, along with two detectives, at a table.

Q Those two men, do you see them in court today?

A I do.

MR. BEAN: Excuse me, your Honor, I would like to make an objection.

THE COURT: This is rebuttal. You may proceed.

MR. POMARO: Detective, do you see those two men in court today?

A I do. The two defendants, Kirby Thomas and Ralph Bean.

MR. POMARO: Indicating for the record the defendants.

Q Would you tell us, please, what happened when [fol. 111] Mr. Shard entered the room?

A As we walked through this first door, entering this room, Mr. Shard, he pointed across the room and he said, "Those are the two men that robbed me."

Q Had you said anything to Mr. Shard concerning these two men prior to his pointing them out?

A No, I did not.

Q Had you indicated in any way that these were the two men involved?

A No, we had not seen them before.

Q Did you know who the two men were prior to this?

A No, I didn't.

Q Is that the first time you saw the two defendants?

A That's correct.

Q And Willie Shard positively identified these two men as the ones who robbed him on February 20, 1968; correct?

A That's correct.

MR. POMARO: Your witness, counsel.

CROSS EXAMINATION

By Mr. Bean:

Q You accompanied Mr. Shard downtown, Officer? You say you accompanied him down to the police station? [fol. 112]

A We picked him up at his place of employment, with my partner, William O'Connor, and myself.

Q And you took him down to the Maxwell Street Station?

A That's correct.

Q And where, specifically, did you take him at the Maxwell Street Station?

A We received a radiogram approximately three-quarters of an hour prior to us bringing him in there, that we should call our office. And at that time we received instructions to go to 828 North Wells Street, and pick up Mr. Shard.

Q What happened after you picked him up, Officer? Where did you take him in the police station?

A We took him to our 4th Area Robbery Section.

Q And is that a room or what?

A We got into the squadroom on the second floor, that's our office, our office is adjoining this room.

Q And the two defendants were in there, at that time, is that right?

A They were sitting in the squadroom.

Q Who were they with at that time?

[fol. 113] A They were sitting at a table with Detective Panepinto and Detective Rizzi.

Q And did you accompany Mr. Shard over to that table?

A I did.

Q Was anyone else sitting at the table, Officer, besides the people you named?

A The two detectives.

Q And the two defendants. Anything else?

A And the two defendants.

MR. BEAN: That's all I have of the officer.

MR. POMARO: No redirect, you may step down.

THE COURT: Step down.

(Witness excused.)

OPINION FILED BY THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, ON MARCH 10, 1970

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

THOMAS KIRBY (Otherwise Called KIRBY THOMAS)
(Impleaded), DEFENDANT-APPELLANT

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

Hon. L. Sheldon Brown, Presiding

MR. JUSTICE LYONS DELIVERED THE OPINION
OF THE COURT.

The defendant was convicted, following a jury trial, of the offense of robbery in violation of Illinois Revised Statutes, Chapter 38, section 18-1 (1967). Judgment was entered on the verdict and defendant sentenced to a term of not less than five nor more than twelve years in the Illinois State Penitentiary. In this appeal the defendant contends that the trial court erred in denying his motions to suppress physical evidence and identification testimony.

At the hearing on the motion to suppress physical evidence, Kirby and his co-defendant testified that they were arrested in the vicinity of 2400 West Madison Street in the City of Chicago, Illinois, on February 22, 1968. The defendant further testified that after police stopped him they searched his person, recovering his personal identification and certain traveler's checks bearing the name Willie Shard. The officers did not inform him that he resembled a man wanted by the police for confidence game, at the time of his arrest.

The arresting officers testified for the State. Officer Baggio Panepinto testified that he and his partner were riding in a squad car in the vicinity of 2200 West Madison when he noticed that the defendant Kirby, then walking, resembled one Alphonso Hampton, who was wanted for con game according to a police department bulletin which bore Hampton's picture and description and which was in the squad car.

Officer Panepinto further testified that the defendant and his companion were stopped and asked to identify themselves. While Kirby was looking for identification in his wallet, he, Panepinto, noticed certain traveler's checks bearing the name "Willie" in the wallet. He asked the defendant who they belonged to and he responded that they were play money. The officer then asked to see the checks. Kirby handed them to Panepinto who was then able to observe the complete name which the checks bore, "Willie Shard." When asked who Willie Shard was, Kirby stated that he won the checks in a crap game. On cross-examination the officer testified that Alphonso Hampton was 5'2" in height and defendant Kirby 5'5" in height. At the time defendant was stopped, the officer did not know that Willie Shard had been the victim of a robbery.

Officer James Rizzi's testimony, insofar as it was relevant to the present defendant, corroborated that of Officer Panepinto.

At the close of this testimony the trial court denied defendant's motion to suppress the traveler's checks and a Social Security Card later taken from defendant and also bearing the name "Willie Shard."

At the hearing on defendant's motion to suppress the identification testimony of the victim, Kirby and his co-defendant each testified that he was not advised of his right to have counsel present prior to and at the time of his identification. The State did not cross examine, nor did they present any evidence. Defendant's motion was denied.

The testimony at trial with respect to Shard's identification of the defendant at the police station was as follows:

WILLIE SHARD

On February 22, 1968, two days after he was robbed and one day after he reported the robbery to the police, he was requested, by phone, to come to the police station. Two police officers picked him up and brought him to the station. The officers who picked him up asked

if he was robbed and if he could identify the offenders and he responded in the affirmative.

When he walked into the police station the defendant and co-defendant were seated at a desk. A police officer asked him if he recognized his assailants and he identified the defendant, along with his co-defendant.

OFFICER JAMES RIZZI

When Mr. Shard arrived at the station, two hours after the defendant had been brought in; the defendants were seated in a large room. Shard walked into the room and stated that Kirby and his co-defendant were the men who had robbed him. The men identified were then asked to stand and Shard reaffirmed the identification. To the best of his knowledge, Mr. Shard was not prompted or coached prior to entering the room.

RALPH BEAN (co-defendant)

He and defendant Kirby were seated at a table with police officers when Mr. Shard arrived. He walked in and stood by the door until approached by another man, who the witness assumed was a police officer. The officer brought Mr. Shard toward the table where he and Kirby were seated. As they approached the table Shard said something to the effect that he did not know or could not identify them, and one of the police officers said that the witness and Kirby must be the ones since they had Shard's property.

This last statement was objected to as hearsay and the objection was sustained.

Defendant first contends that the trial court erred in denying his motion to suppress physical evidence. He argues that his arrest was without probable cause and therefore the physical evidence taken from his person should have been suppressed as the product of an unlawful arrest. While the defendant properly states the proposition of law, the testimony of Officer Panepinto, which the trial court was at liberty to, and apparently did believe, clearly presents a factual situation in which

the rule is not applicable. The officer testified that he noticed the traveler's checks in defendant's wallet while defendant was looking for identification. Further, the officer testified that defendant surrendered the checks to him upon request. Clearly the checks were not recovered by the officer as the result of a search. Rather, their discovery falls within the purview of the plain view doctrine of *People v. Davis*, 33 Ill. 2d 134, 210 N.E. 2d 530 (1965).

Defendant is also correct in his assertion that the mere possession of the goods of another is not sufficient to establish probable cause for arrest. Here, however, an additional element is present. Defendant's possession, coupled with his having given conflicting explanations of that possession, is sufficient to establish probable cause for arrest. The Social Security Card taken from defendant was not recovered until after probable cause for the arrest existed.

This determination, that defendant's arrest was based upon probable cause, is also determinative of his second contention, that the identification testimony should have been suppressed as the product of an unlawful arrest.

Defendant next contends that the trial court erred in denying his motion to suppress identification testimony in that he was not advised of his right to have counsel present at the showup, relying on *U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967). In *Wade*, the defendant was placed in a police lineup subsequent to his having been indicted and prior to trial without notice to, and in the absence of, his court appointed counsel. In finding the procedure improper the court held that a post-indictment lineup was a critical stage of the proceedings against the accused and therefore the Sixth Amendment guarantee of assistance of counsel applied thereto.

In *Gilbert*, the accused was also placed in a post-indictment lineup without notice to defense counsel. All the witnesses who identified Gilbert at trial testified that they had also identified him at the lineup. The court, following *Wade*, held: (1) the lineup was held in viola-

tion of Gilbert's Sixth Amendment rights and therefore testimony with respect thereto was not admissible against him; and (2) it was error to admit into evidence the in-court identification of the accused without first determining that such identification was not tainted by the illegal lineup, but was of independent origin.

People v. Palmer, 41 Ill. 2d 571, 244 N.E. 2d 173 (1969) determines the issue adversely to defendant. There the Supreme Court, in interpreting the language of *Wade v. Gilbert*, and the subsequent case of *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1968), held those decisions to apply only to post-indictment confrontations. Here the record clearly shows the showup to have taken place prior to defendant's indictment.

Defendant's third contention in support of his allegation that testimony regarding his showup identification should have been suppressed constitutes a direct attack upon the use of a showup as an identification procedure. He argues that the showup is inherently suggestive in nature and therefore where no compelling reason for securing an immediate identification such as was found to exist in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967), exists, a lineup should always be held. We are aware of no such requirement. On the contrary, the Supreme Court has noted that while the showup has been observed to involve a degree of suggestion, not every exhibition of an accused by means of a showup, where a lineup is possible, constitutes a denial of due process. *People v. Blumenshine*, 42 Ill. 2d 508, 250 N.E. 2d 152 (1969).

The defendant also contends that the circumstances surrounding his identification were so suggestive as to deny him due process of law. In support of this argument defendant again points out that a showup, rather than a lineup, procedure was used, which allowed the identification witness to view him while he was seated between two police officers. He further calls attention to the fact that Mr. Shard knew the purpose for his trip to the police station, to make an identification.

There is no doubt that an identification procedure may be so suggestive in a given case as to deny the accused

due process of law. But when called upon to determine whether due process has been denied a particular individual, courts must consider the totality of the circumstances surrounding the identification, not merely those which tend to support defendant's theory. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967). Here the victim was attacked during the daylight hours and had an excellent opportunity, according to his own testimony, to observe the assailants before, during, and after the assault. In addition, he was positive in his identification of defendant as one of the offenders. In this same regard, Officer Panepinto testified that Mr. Shard identified the defendant immediately upon sight. In view of the totality of the circumstances surrounding the identification, we do not believe that defendant was denied due process of law.

Finally, the defendant has contended that he was denied effective assistance of counsel at the hearing on his motion to suppress the identification testimony. Defendant points out that although the written motion to suppress submitted to the court contained two points, the first relating to Sixth Amendment rights and the second to due process considerations, defense counsel elicited testimony only regarding the first, right to counsel. This allegation of denial of effective assistance of counsel is directed only to the hearing on motion to suppress identification testimony. It appears to be an effort by defendant to save, for purposes of appeal, a point not properly presented to the trial court. We deem this contention to be moot in view of our having considered defendant's due process argument.

Having found each of the contentions of defendant to be without merit, we affirm the judgment of the Circuit Court.

JUDGMENT AFFIRMED.

MCCORMICK, P.J., and BURKE, J., concur.

SUPREME COURT OF THE UNITED STATES

No. 6401, October Term, 1970

THOMAS KIRBY, ETC., PETITIONER

v.

ILLINOIS.

On petition for writ of Certiorari to the Appellate Court of the State of Illinois, First District.

On consideration of the motion for leave "to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition which reads as follows:

"(2) Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred."

May 24, 1971